STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 22, 2007
v	No. 265848 Hillsdale Circuit Court
DANNY RAY PENNEBAKER, Defendant-Appellant.	LC No. 99-238428

Before: Sawyer, P.J., and Fitzgerald and Donofrio, JJ.

PER CURIAM.

In 1999, defendant pleaded no contest to one count of receiving or concealing stolen property in excess of $1,000 but less than $20,000, MCL 750.535(3). The trial court sentenced defendant as a second habitual offender, MCL 769.10, to serve a term of imprisonment of 48 to 90 months, consecutive to sentences anticipated for two criminal cases pending in Jackson County. However, that sentence was improper because consecutive sentencing was not available in connection with sentences not yet imposed. The trial court resentenced defendant on August 18, 2004, noted that the Jackson County sentences had by then come into being, and so again imposed a consecutive sentence, this time of 16 to 90 months' imprisonment. Defendant appeals by delayed leave granted, challenging only the consecutive nature of the instant sentence. We vacate defendant's sentence and remand for further proceedings. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant committed the instant offense in April 1999, while other felony charges were pending in Jackson County. After several years of incarceration, defendant became aware that his sentence was flawed for being ordered to run consecutively to sentences not yet in existence. See *People v Chambers*, 430 Mich 217, 231; 421 NW2d 903 (1988).

At resentencing, the trial court admitted that it erred in initially imposing a consecutive sentence, "because we were actually the court first in time," adding, "So the Jackson County court . . . would have had to sentence you first in order for me to give you consecutive sentencing at that time." However, the court continued, "you now have been sentenced by the Jackson County courts so . . . that impediment to consecutive sentencing has now been removed." The court then imposed the instant consecutive sentence.

The question is whether a sentencing court, having erroneously imposed a consecutive sentence in connection with others not yet handed down, may then grant resentencing to correct that error, but then note that the other sentences in question have been imposed in the interim,

and on that basis impose consecutive sentencing after all. We hold that a sentencing court cannot do so.

Consecutive sentences may be imposed only when specifically authorized by statute. *Chambers, supra* at 222. A sentencing court has discretion to impose a consecutive sentence for a new offense committed while the offender was free on bond in connection with proceedings stemming from commission of another felony. MCL 768.7b(2)(a). A consecutive sentence should be imposed "only after awareness of a sentence already imposed so that the punitive effect of the consecutive sentence is carefully considered at the time of its imposition." *Chambers, supra* at 231 (internal quotation marks and citation omitted).

The first-in-time rule holds sway even in mandatory consecutive sentencing situations if sentencing is pending on the other felony that is not itself subject to consecutive sentencing. *People v Hunter*, 202 Mich App 23, 26; 507 NW2d 768 (1993). "[T]he mere sequencing of sentencing may operate . . . to circumvent the Legislature's intent to impose a consecutive sentence . . . ." *Id.* at n 2. But resorting to consecutive sentences at resentencing, in connection with other sentences imposed after the initial sentencing and before resentencing, is permissible where consecutive sentencing is mandatory. See *People v Lee*, 233 Mich App 403, 406-407; 592 NW2d 779 (1999) (MCL 333.7401[3] "draws no distinction between an original sentence and a sentence imposed on resentencing. The only relevant inquiry under the statute is whether, at the time of sentencing for the enumerated offense, the defendant has already been sentenced for another felony.").

Where consecutive sentencing is discretionary, however, that prerogative may be exercised only by the second of two original sentencing courts. "*Chambers* addresses which of two *original* sentencing courts have authority to impose a discretionary consecutive sentence. Clearly, a sentence imposed following a remand for resentencing is not an original sentence." *People v Cuppari (After Remand)*, 214 Mich App 633, 638 n 2; 543 NW2d 68 (1995).

Accordingly, we cannot condone the practice of avoiding the dictates of *Chambers, supra*, through the expedient of imposing a partially invalid sentence in the first instance, then letting time bring about a cure for the problem while machinations are in progress to correct that invalidity. For these reasons, we hereby vacate defendant's new sentence, and remand this case to the trial court with instructions to reinstate defendant's original sentence, except amended to indicate concurrent sentencing.[1]

Vacated and remanded. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald
/s/ Pat M. Donofrio

[1] Because defendant's 90-month maximum sentence, running from the original sentencing date of June 28, 1999, with the 62 days' credit then granted, has expired, we need not concern ourselves over the trial court's decision to reduce defendant's minimum sentence from 48 months' to 16 months' imprisonment.